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IN THE

Supreme Court of the United States

October Term, 1965

OCTAVE HOWARD, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

OCTAVE HOWARD, *Petitioner*

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented For Review	2
Constitutional Provisions And Statutes Involved	2
Statement of the Case	4
Reasons for Allowance of the Writ	5
Conclusion	6
Appendix "A" - Opinion of the Court of Criminal Appeals	7

LIST OF AUTHORITIES

CASES	Page
Breen v. Beto, 341 F.2d 96	5
Lane v. Warden, 320 F.2d 179	5
UNITED STATES CONSTITUTION	
Sixth Amendment	2
Fourteenth Amendment	2, 3
UNITED STATES STATUTES	
28 U.S.C.A. Sec. 1257(3)	2
TEXAS PENAL CODE	
Article 61	3
Article 483	3

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OCTAVE HOWARD, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

To The Honorable Court:

Petitioner, OCTAVE HOWARD, Prays that a writ of certiorari issue to review the Judgment of the Court of Criminal Appeals of Texas affirming his conviction for carrying a pistol, with two prior convictions being alleged in the information for enhancement purposes.

OPINION BELOW

The Court of Criminal Appeals Opinion, dated February 10, 1965, 387 S.W.2d 387, is reproduced as Appendix "A" to this Petition.

JURISDICTION

The date of the judgment sought to be reviewed is dated February 10, 1965. (R. 138)

A motion for rehearing was overruled on the 17th day of March, 1965, without a written opinion. (R. 143, 149)

The statutory provision believed to confer jurisdiction on this Court to review the Judgment or Decree in question by writ of certiorari is 28 U.S.C.A. Sec. 1257(3).

QUESTION PRESENTED FOR REVIEW

In a criminal prosecution for unlawfully carrying a pistol, can the State of Texas read to the jury at the commencement of the trial allegations as to two prior similar convictions, and elicit evidence thereon before a finding of guilt or innocence on the primary offense without abridging the Defendant's rights to a fair trial before an impartial jury secured him by the 6th and 14th Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution reads verbatim as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section One of the Fourteenth Amendment reads verbatim as follows:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 483 of the Texas Penal Code, 1 V.A.T.S. Penal Code, reads verbatim as follows:

Any person who shall carry on or about his person, saddle, or in his saddlebags, or in his portfolio or purse any pistol, dirk, dagger, slung shot, blackjack, hand chain, night stick, pipe stick, spear, knuckles made of any metal or any hard substance, bowie knife, switch blade knife, spring blade knife, throw blade knife, a knife with a blade over five and one-half (5½) inches in length, or any other knife manufactured or sold for the purpose of offense or defense shall be punished by a fine of not less than One Hundred Dollars ($100) nor more than Five Hundred Dollars ($500) or by confinement in jail for not less than one (1) month nor more than one (1) year.

Article 61 of the Texas Penal Code, 1 V.A.T.S. Penal Code, reads verbatim as follows:

If it be shown on the trial of a misdemeanor that the defendant has been once before convicted of the same offense, he shall on second conviction receive double the punishment prescribed for such offense in ordinary cases, and upon a third or any subsequent con-

viction for the same offense, the punishment shall be increased so as not to exceed four times the penalty in ordinary cases.

STATEMENT OF THE CASE

Petitioner was charged in the County Criminal Court at Law No. 3, Harris County, Texas, with unlawfully carrying a pistol, with two previous convictions being alleged in the information. (R. 2, 3) Appellant was convicted by a jury and he was given four (4) years in the County Jail. (R. 12)

Before trial, Petitioner moved to quash the information as to the two prior convictions. (R. 5, 6) This motion was denied by the trial court (R. 7) and the trial proceeded, whereupon the information, in its entirety, was read to the jury.

Evidence was elicited by the prosecutor not only as to the instant offense for which he was on trial, e.g., carrying a pistol, but also as to the two prior convictions.

After conviction, upon appeal to the Court of Criminal Appeals of Texas, the only and last Court of resort open to Petitioner under Texas practice, Petitioner raised and briefed and argued orally the question presented for review. The Court disposed of the question thusly,—Quoting from the Court's opinion:

> "Appellant complains of the overruling of his motion to quash the information upon the ground that the reading of the allegations of the prior convictions to the jury would be so prejudicial that he could not receive a fair trial.

> "The complaint is further urged that Appellant was in fact deprived of a fair trial by reason of the allegation and proof of his prior convictions for carrying a pistol. The State may allege and prove a previous conviction for the purpose of enhancing the punishment under the applicable enhancement statute.,"citing authority.

The question was again raised in Petitioner's Motion for A Rehearing, (R. 143) which motion was overruled without a written opinion on the 17th day of March, 1965. (R. 149)

REASONS FOR ALLOWANCE OF THE WRIT

The Supreme Court has never passed on this precise question.

All but a handful of States have such statutes on the books and most apply the statutes in the same manner as Texas; that is, the States allege the prior convictions in the information; or indictment, read the indictment to the jury, then elicit evidence thereon in front of the jury, and this procedure is followed before the jury returns a verdict on the offense for which the defendant is on trial.

In an identical question presented to the Fourth Circuit in *Lane v. Warden*, 320 F.2d 179, the question was answered "no".

The United States Court of Appeals for the Fifth Circuit in *Breen v. Beto*, 341 F.2d 96 answered the question "yes".

Petitioner would take the same position as did the petitioner in the *Lane* case.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that this court issue its writ of certiorari to the Court of Criminal Appeals of Texas for review of that court's judgment in this matter.

Respectfully Submitted,

_____

Octave Howard, Petitioner

_____

Charles Owen Melder, Attorney
739A Tennessee Building
Houston, Texas 77002

Of Counsel

APPENDIX "A"

OCTAVE HOWARD, Appellant

No. 37,763 vs. --- Appeal from Harris County

THE STATE OF TEXAS, Appellee

OPINION

The offense is unlawfully carrying a pistol; the punishment, enhanced by two prior convictions for like offense, four years in jail.

The sufficiency of the evidence is questioned.

The prior convictions for carrying a pistol alleged in the complaint and information were proved. The judgments of conviction were introduced and testimony was offered as to the identity of the defendant and the time of the commission of the offenses. On cross-examination the appellant admitted that he had been previously convicted as alleged.

Ethel Broadway testified that she saw appellant in the bedroom or midle room of her mother's home on the date alleged in the information; that he had a pistol in his hand; that he struck her; threatened to kill her and "snapped" the pistol at her. She called her mother who was in the kitchen and she came and ordered appellant to get out of the house. He said he wasn't going anywhere and started "cussing" and fighting with her. Appellant fired the pistol into the floor in the living room and the witness' sister was sent next door to call the police.

As the police were arriving at the house, appellant threw the pistol under the divan where the officers found it.

The witness Ethel Broadway testified that appellant at first told her not to tell the police "he throwed it under the divan" but that she told them where it was.

Lucille Jordan, mother of Ethel Broadway, corroborated her daughter's testimony as to appellant having the pistol in her home and firing it into the floor of her living room.

Patrolman C. B. Terpstra, of the Houston Police Department, who responded to the call to go to the address, testified that when he arrived someone called out "he has a gun."

Upon entering the house he found appellant and two women in the living room. Appellant was immediately searched after they pointed at him.

Officer Terpstra was asked and answered:

"Q. Did you find anything when you searched the defendant?
"A. Yes, sir, we found a blackjack.
"Q. Do you have it with you?
"A. Yes, sir.

"Mr. Stover: (Assistant District Attorney) I would like to have this blackjack marked for identification purposes as State's Exhibit No. 3."

Appellant's counsel then objected and his objection was sustained. He moved for a mistrial, which motion the court overruled.

It will be noticed that the evidence was before the jury before any objection was made and there was no motion or request to have the evidence withdrawn. Under such facts no reversible error is shown.

If there was any error in the trial court's rulings, it was against the state when the cautious trial judge sustained appellant's objection on the ground that "it is not the offense for which he is charged." Art. 487 V.A.P.C.; Giacona v. State, 372 S.W.2d 328; Yaffar v. State, 349 S.W.2d 730; Ross v. State, 334 S.W.2d 174.

Patrolman Terpstra further testified that Miss Broadway told him that appellant threw the pistol behind the couch and he found the pistol which was introduced in evidence there. He also testified that he saw a bullet hole in the floor of the living room; found a fired cartridge in the pistol.

Appellant testified that the pistol was one he had previously bought and given to Ethel Broadway. He denied that he took the pistol to Lucille Jordan's house or that he fired it. It was his testimony that Ethel had the pistol and her mother had a knife or dagger when they "called the law" and that Ethel handed the pistol to the police when they got there.

Appellant also denied that he threw the pistol behind the couch or that the officers found it there; that he fired the pistol into the floor; that anyone fired the pistol while he was there; that he had ever fired the gun, or that he "ever had the pistol at all out there that day."

We find no merit in the contention that appellant was not shown to have moved about with a pistol. The state offered proof that he had the pistol in his hand in the bedroom and in the living room of the home of Lucille Jordan, fired it and threw it behind the couch where it was found. Ethel Broadway testified, on cross-examina-

tion: "Q. Are you stating the defendant brought this pistol to your house? A. He brought it to the house."

The jury decided the fact issue against the appellant and we find the evidence sufficient to sustain the conviction.

Appellant's complaint as to the court's charge was not raised in his objections and exceptions to the charge, hence need not be discussed other than to observe that it relates to the prior convictions and the application of Art. 61 P.C.

Appellant complains of the overruling of his motion to quash the information upon the ground that the reading of the allegations of the prior convictions to the jury would be so prejudicial that he could not receive a fair trial.

The complaint is further urged that appellant was in fact deprived of a fair trial by reason of the allegation and proof of his prior convictions for carrying a pistol.

The state may allege and prove a previous conviction for the purpose of enhancing the punishment under the applicable enhancement statute. (Arts. 61 to 63 P.C.) Stephens v. State, 377 S.W.2d 189, and cases cited. See also Wigginton v. State, No. 37,645.

Our disposition of appellant's claim of error in the overruling of his motion for mistrial based upon the testimony to the effect that a blackjack was found in the search of the appellant's person disposes of the complaint as to the argument of the prosecuting attorney directing attention to such testimony.

No reversible error appearing, the judgment is affirmed.

Woodley, Judge.

(Delivered February 10, 1965.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

OCTAVE HOWARD,
Petitioner

vs.

THE STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN REPLY TO PETITIONER'S WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE NATURE OF THE CASE	2
ARGUMENT AND AUTHORITIES	2
CERTIFICATE OF SERVICE	9

LIST OF AUTHORITIES

Page

Baltimore Radio Show v. State, 67 A.2d 497, 510, reversed on other grounds 8

Brandenburg v. Steele, 177 F.2d 279 (8th Cir. 1949) 6

Braggs v. United States, 176 F.2d 317, 321 (10th Cir. 1949) cert. den. 338 U.S. 861 8

Breen v. Beto, 341 F.2d 96 (5th Cir. 1965) 2

Finnegan v. United States, 204 F.2d 105 (8th Cir. 1953) cert. den. 346 U.S. 821, reh. den. 346 U.S. 880 7

Gianotos v. United States, 104 F.2d 929 (8th Cir. 1939) 8

Gore v. United States, 244 F.2d 763 (C.A.D.C. 1957) affirmed 357 U.S. 386 ..... 7, 8

Huff v. United States, 273 F.2d 56 (5th Cir. 1959) 6

Lane v. Warden, Maryland Penitentiary, 320 F.2d 179 (4th Cir. 1963) 2, 3, 4, 5, 6, 7, 8

Mackie v. State, 367 S.W.2d 697 (1963) 5

Michelson v. United States, 335 U.S. 469 (1948) 5, 6

Reyes v. Beto, 345 F.2d 722 3

Roe v. United States, 316 F.2d 617 (5th Cir. 1963) 6

Wendell Odell Stephens v. Beto, 377 S.W.2d 139 (1964) cert. den. — U.S.—, 85 S.Ct. 1344 (1965) 3

LIST OF AUTHORITIES—Continued

	Page
Taylor v. Beto, 346 F.2d 157	3
United States v. Pullings, 321 F.2d 287 (7th Cir. 1963)	7
United States v. Rabin, 316 F.2d 564 (7th Cir. 1963)	7
United States v. Taylor, 207 F.2d 437 (2nd Cir. 1953)	6
Williams v. United States, 317 F.2d 545 (C.A.D.C. 1963)	7
Wolfe v. Nash, 313 F.2d 393 (8th Cir. 1963) cert. den. — U.S. —, 84 S.Ct. 705 (Feb. 24, 1964)	4, 5
STATUTES	
United States	
Rule 8, Federal Rules of Criminal Procedure	6
Rule 8(a), Federal Rules of Criminal Procedure	7
Rule 13, Federal Rules of Criminal Procedure	6, 7
CONSTITUTIONS	
United States	
Sixth Amendment	2
Fourteenth Amendment	2

NO. 122

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

OCTAVE HOWARD,

Petitioner

VS.

THE STATE OF TEXAS,

Respondent

BRIEF OF RESPONDENT IN REPLY TO PETITIONER'S WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES The State of Texas, Respondent, in response and states:

OPINION BELOW

Petitioner's citation of such opinion is correct.

JURISDICTION

It is respectfully submitted that no substantial federal question is presented for review by this Court.

QUESTION PRESENTED

In a criminal prosecution for unlawfully carrying a

pistol, can the State of Texas read to the jury at the commencement of the trial allegations as to two prior similar convictions, and elicit evidence thereon before a finding of guilt or innocence on the primary offense without abridging the Defendant's rights to a fair trial before an impartial jury secured him by the Sixth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These are cited in Petitioner's Brief.

STATEMENT OF THE NATURE OF THE CASE

The facts as shown in Petitioner's Brief are substantially correct.

ARGUMENT AND AUTHORITIES

Petitioner was not denied due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States because the indictment under which he was charged alleged two prior convictions and was read to the jury and proof of the prior convictions was made before the jury following the submission of proof of the principal offense. In support of this contention, Petitioner relies strongly on *Lane v. Warden, Maryland Penitentiary,* 320 F.2d 179 (4th Cir. 1963).

The United States Court of Appeals for the Fifth Circuit undertook the determination of this question in the instant case in *Breen v. Beto,* 341 F.2d 96 (5th Cir. 1965), which was decided on January 28, 1965. In that opinion, the Court disposes of *Lane v. Warden,* supra, with the following statement at page 97:

"In support of his contention, appellant cites and strongly relies on Lane v. Warden, 320 F(2) 179 (4th Cir. 1963). This court has never so held, and under the controlling Texas Statutes and the authorities we are not disposed to adopt or follow the cited opinion. On the contrary, we are of the firm view that that case was not well decided and that the correct view of the law is otherwise."

The Court of Appeals for the Fifth Circuit has also considered this matter in the cases of *Reyes v. Beto,* 345 F.2d 722 and *Taylor v. Beto,* 346 F.2d 157. The same contention was presented to the Supreme Court of the United States in the case of *Wendell Odell Stephens v. Beto,* 377 S.W.2d 139 (1964), by way of application for writ of certiorari. This Court denied certiorari in 1965, — U.S. —, 85 S.Ct. 1344, April 26, 1965.

By way of further discussion of *Lane v. Warden,* supra, Respondent submits the following.

In *Lane,* the Court of Appeals for the Fourth Circuit considered a conviction in a court of Maryland. The defendant was charged by indictment for selling narcotics and in the indictment two prior convictions were alleged for the purpose of enhancing punishment. (actually there were three indictments, each charging a principal offense together with two prior convictions). The defendant objected to the reading of the indictments because they contained the prior convictions, but his objection was overruled. The Court of Appeals held that the reading of the indictments with their allegations of prior convictions denied the defendant a fair trial because the fairness of the jury was impaired by the knowledge of the defendant's prior criminal history.

Respondent disputes the applicability of *Lane v.*

Warden, supra, urging that the facts of *Lane* are not analogous to the present case and also that the philosophy underlying the *Lane* decision is illogical and erroneous.

The *Lane* opinion at page 186 puts special emphasis on the proposition that the prejudice resulting from the reading of the two prior convictions to the jury could have been avoided by the State's following alternative Maryland procedures. No alternative methods of proving prior convictions are available under Texas practice.

Second, the defendant in *Lane* was charged under three indictments, each alleging the crime in issue, plus two prior convictions. Only one indictment is involved in the present case.

However, regardless of the facts and circumstances which distinguish LANE v. WARDEN *from the case before this Court, Respondent strongly urges that the reasoning in* LANE v. WARDEN *is specious and should not be followed.*

Wolfe v. Nash, 313 F.2d 393 (8th Cir. 1963) cert. den. — U.S. —, 84 S.Ct. 705 (Feb. 24, 1964) is directly contra to *Lane v. Warden.* In *Wolfe v. Nash,* the evidence of prior felony convictions of the defendant was offered in the presence of the jury and it was argued by the defendant that a fair trial was denied. The Court disposed of this proposition, saying at page 401:

> "... How and in what way proof of prior convictions shall be made under the State Habitual Criminal statute and what effect a deviation from the requirements of the statute would have, we regard as purely a local legal problem and of no national concern whatever. The due process clause of the Fourteenth Amendment does not enable us to review errors of state law."

The Texas decisions have uniformly upheld the constitutionality of its habitual offender enhancement statutes. *Mackie v. State,* 367 S.W.2d 697 (1963).

Not only is *Lane v. Warden* an innovation in criminal and constitutional law, its holding being in direct conflict to *Wolfe v. Nash,* the Texas authorities, and innumerable other state decisions which have construed habitual offender acts, but *Lane* relies in part on authority that is apparently completely contradictory to the holding. At page 181 of the *Lane* opinion, the Court cites *Michelson v. United States,* 335 U.S. 469 (1948), and quotes at length from this opinion, sought to be distinguished by Respondent. The Court in *Lane* did observe in footnote number 4 at page 182 that the *Michelson* decision had some language which did not accord with the decision in *Lane. Lane* was referring to page 475 in *Michelson* where the Court observes:

> "The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime."

Michelson then states in a footnote appended to this quotation that:

> "This (rule) would be subject to some qualifications, as when a prior crime is an element of the later offense; for example, *at a trial for being an habitual criminal.* There are well-established exceptions where evidence as to other transactions or a course of fraudulent conduct is admitted to establish fraudulent interest as an element of the crime charged." (Emphasis added)

It is difficult to perceive how the *Lane* opinion could cite the *Michelson* case and then purport to distinguish it logically.

Michelson not only clearly suggests that the Supreme Court of the United States approves of the practice in habitual offender cases of informing the jury of prior convictions and offering proof thereof, but *Michelson* also points to the long and firmly entrenched rule that other, extraneous crimes, may be shown to establish intent. Along with intent, proof of extraneous crimes has been permitted to show identity, motive and plan or design. Proof before the jury of crimes committed by the defendant other than those charged in the indictment has been approved in *Roe v. United States,* 316 F.2d 617 (5th Cir. 1963), and *Huff v. United States,* 273 F.2d 56 (5th Cir. 1959).

Lane v. Warden also points out another area where the jury can properly be apprised of crimes which the defendant has committed other than the crime charged. This is where the defendant puts his character in issue through the use of character witnesses or by himself taking the stand and so permitting interrogation as to previous convictions.

The *Lane* theory that informing the jury of prior crimes must necessarily destroy the impartiality of the jury, is further refuted by the procedures authorized in Rules 8 and 13 of the Federal Rules of Criminal Procedure.

Rule 8 permits the joinder of two or more offenses in the same indictment as well as the joinder of defendants. Rule 13 authorizes the Court to order the consolidation of two or more indictments in a joint trial. Under the authority of these rules, promulgated by the Supreme Court of the United States, an information charging 225 separate and distinct crimes was upheld in *United States v. Taylor,* 207 F.2d 437 (2nd Cir. 1953). In *Brandenburg v. Steele,* 177 F.2d 279

(8th Cir. 1949), the defendant was indicted for 11 separate offenses of unlawful sales of narcotic drugs. In discussing Rules 8(a) and 13 and their predecessor statute, the Court observed:

> "... In view of the statute and the Rules prescribed by the Supreme Court above referred to, which authorized the procedure which resulted in the appellant's conviction, it is obvious that he is entirely mistaken in his assertion about denial of due process. He was dealt with in accordance with long established and conventional federal procedure."

Under the philosophy of *Lane v. Warden,* the federal procedure in charging separate offenses in one indictment and the consolidation of indictments should be struck down and declared violative of the constitutional guarantee to a fair and impartial trial. Surely the impact upon the jury which *Lane* worries about (the reading of an indictment charging two previous convictions) is greater and more destructive to impartiality when an information charging 225 separate offenses is read or when an indictment charging 11, distinct, unlawful sales of narcotics is read. Nevertheless, the federal practice of using multiple-count indictments and the consolidation of indictments finds continued sanction in federal decisions. See *United States v. Rabin,* 316 F.2d 564 (7th Cir. 1963); *Finnegan v. United States,* 204 F.2d 105 (8th Cir. 1953) cert.den. 346 U.S. 821, reh. den. 346 U.S. 880; *United States v. Pullings,* 321 F.2d 287 (7th Cir. 1963); *Williams v. United States,* 317 F.2d 545 (C.A.D.C. 1963). See also *Gore v. United States,* 244 F.2d 763 (C.A.D.C. 1957) affirmed 357 U.S. 386.

Respondent does not quarrel with the general rule that evidence showing the accused has committed a

crime or crimes independent of the crime charged is inadmissible. The basis of this tenet is that the tendency of such evidence to prejudice the jury outweighs the probative evidentiary value in the usual case. However, the rule is not a constitutional right, but rather is a rule of evidence. *Baltimore Radio Show v. State,* 67 A.2d 497, 510, reversed on other grounds. The limitation on the admission of evidence of other crimes is subject to a number of exceptions, as have been noted above, the exceptions being founded on considerations of justice and wisdom just as is the exclusionary rule itself. *Gianotos v. United States,* 104 F.2d 929 (8th Cir. 1939); *Braggs v. United States,* 176 F.2d 317, 321 (10th Cir. 1949) cert.den. 338 U.S. 861. In the case of habitual offenders, the purpose of the statutes is to protect society from a person or from criminals who persist in the commission of crime and by serving as a warning to first offenders. *Gore v. United States,* supra. These considerations override, and logically so, the rule forbidding the introduction of and proof of other crimes.

Respondent submits that the Texas practice of handling habitual offenders in no way denies to defendants a fair and impartial trial under all principals, standards and doctrines of the law (except *Lane v. Warden*). Respondent does not say that there could not be a better method of proving prior crimes for the purpose of enhancing punishment or a method that is more favorable to the defendant, but Respondent does maintain that the Texas procedure in no way contravenes any of the protections or rights guaranteed by the United States Constitution.

Respectfully submitted,

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HOWARD M. FENDER
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GILBERT J. PENA
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CHARLES B. SWANNER
Assistant Attorney General

By: ----------
Assistant Attorney General

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CERTIFICATE OF SERVICE

I am an Assistant Attorney General of the State of Texas and a member of the Bar of the Supreme Court of the United States, and do now enter my appearance in the Supreme Court of the United States in the above captioned cause, on behalf of the Respondent; I do further certify that a copy of the foregoing brief has been forwarded by United States Mail, First Class, Postage Prepaid, to Charles Owen Melder, Attorney at Law, 739A Tennessee Building, Houston, Texas, 77002, Attorney for Petitioner, this the 2 day of November, 1965.

Assistant Attorney General